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No. 82-893

In the Supreme Court of the United States

OCTOBER TERM, 1982

JACK C. STOLLER, PETITIONER

v.

JOHN O. MARSH, JR., SECRETARY OF THE ARMY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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Petitioner seeks to bring Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, three employment discrimination claims under that relate to events occurring before Title VII became applicable to the federal government.

1. a. Beginning in March 1967, petitioner was a civilian employee of the Department of the Army in Saigon. After his first year in Vietnam, he was transferred to the United States although he wished to remain in Vietnam. In 1969, petitioner sought, but was denied, overseas employment with the Department of the Army. In May 1972, petitioner was informed that in 1971 the Career Screening Panel had placed him in a "deferred" category on the ground that he was ineligible for promotion. Although an administrative procedure for challenging these actions as discriminatory was available to petitioner, he did not file any administrative charge. Pet. App. 3a-4a & n.1, 31a-32a.

Later in 1972, the Career Screening Panel placed petitioner in a promotable category but did not recommend him for promotion. Petitioner was notified of this action and filed an administrative complaint, claiming that he had been discriminated against because he is Jewish. After a lengthy investigation, the Civil Service Commission found that the Army had not discriminated against petitioner, and that decision was affirmed by the Appeals Review Board. Pet. App. 4a-5a, 32a.

Petitioner then brought this Title VII action in the United States District Court for the District of Columbia. Petitioner alleged that the Department of the Army violated 42 U.S.C. 2000e-16(a) because it " 'has discriminated and is continuing to discriminate against [petitioner] in each of the following ways': (1) the 1968 refusal to allow him to 'complete his normal tour in Vietnam'; (2) the denial of his application in 1969 for another overseas assignment; (3) the 1971 panel's decision that he was ineligible for promotion; and (4) the 1972 panel's restriction of his promotional opportunities."

The district court granted summary judgment against petitioner on all four claims. The district court reviewed petitioner's deposition and noted that "[a]t no time in his deposition did [petitioner] point to any specific conduct to support his argument that he was the victim of discrimination" (Pet. App. 35a). But the district court dismissed the first three claims for two other reasons. First, the court ruled that petitioner had failed to file a timely complaint challenging these three actions, even though "the record demonstrates that [petitioner] was aware of the alleged discriminatory acts and could have filed timely claims" (*id.* at 36a) and petitioner testified, in his deposition, that "he was aware of procedures for making a complaint" (*id.* at 35a). Second, the court ruled that because petitioner's first three claims pertained to events that occurred before March

24, 1972 — the date Title VII became applicable to the federal government — the district court "lack[ed] jurisdiction" (*id.* at 36a).

The district court also dismissed petitioner's fourth claim, ruling that petitioner had not alleged a discriminatory act by the Career Screening Panel in 1972. Instead, the court said, petitioner alleged only that discrimination that occurred in 1968 and 1969 was reflected in his record and his file and influenced the Panel's decision. The district court held that such a claim was barred by *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553 (1977). Pet. App. 36a-38a.

b. The court of appeals affirmed the district court's grant of summary judgment against petitioner's first three claims but reversed on the fourth claim. The court of appeals stated that a claim alleging discrimination by the federal government before 1972 would not be barred "if a continuing violation began before that date but extended after it" (Pet. App. 7a). The court noted that petitioner sought to invoke the continuing violation doctrine by "contend[ing] that, to cover up the allegedly discriminatory and procedurally irregular decision to reassign him to the United States after one year in Vietnam, his superiors created a 'secret file' which was subsequently used by the Army to deny him an overseas assignment in 1969, promotable status in 1971, and a promotion in 1972" (*id.* at 8a). But the court of appeals ruled (*id.* at 8a-10a, quoting *Milton* v. *Weinberger*, 645 F.2d 1070, 1076 (D.C. Cir. 1981); footnotes omitted):

> [T]hese allegations, even if proven, would not establish a "continuing violation" of Title VII; they do not adequately link four separate episodes of alleged discrimination into a single, continuous policy.
>
> * * * * *
>
> [A] series of allegedly discriminatory actions against the same employee, even with the same alleged motive

> such as * * * discrimination, is not enough. * * * [Petitioner] has not adequately alleged that the pre-and post-1972 acts by the government "constituted continuing discrimination, pervasive bias, or unlawful employment policies, thus entitling [him] to relief from the time limits [of Title VII. Petitioner] * * * seek[s] relief not from an unlawful program of discrimination, but from specific, perhaps unrelated instances of it."

With respect to petitioner's fourth claim, however, the court of appeals ruled that "Title VII is violated when an employing organization uses discriminatory evaluations of an employee which were prepared by its own supervisory personnel, unless its procedures have given the employee a reasonable opportunity to inspect and correct these evaluations." Pet. App. 11a. The court of appeals reasoned that "[t]he discriminatory action of which [petitioner] complains is the failure to promote * * *; the * * * alleged discriminatory animus [of those who allegedly placed an unfavorable evaluation in petitioner's file] is background information which might make th[at] decision discriminatory." *Id.* at 15a.

2. a. Despite the court of appeals' specific statement that petitioner's "*allegations*, even if proven, would not establish a 'continuing violation' of Title VII" (Pet. App. 8a; emphasis added), petitioner insists (Pet. 8-9, 10-13) that the court of appeals' affirmance of the grant of summary judgment on the first three claims rests on an improper resolution of disputed factual issues. But petitioner does not identify any respect in which the court of appeals misstated his allegations; indeed, petitioner's statements of his allegations correspond precisely with the court of appeals'. Compare Pet. 15 with Pet. App. 8a. While, as petitioner says (Pet. 10-11), there were of course disputed issues of fact in the case — the government by no means concedes that petitioner's factual allegations are correct — petitioner is unable to specify any

way in which the court of appeals did not accept his version of the facts before concluding that he had not alleged a continuing violation in connection with his first three claims.

b. Petitioner also contends (Pet. 13-17) that the court of appeals erred in not concluding that his allegations constituted a "continuing violation" that entitles him to seek relief for alleged discriminatory acts that occurred before 1972. But petitioner has identified only four discrete acts that he alleges were discriminatory; he has not alleged a continuing policy of discrimination directed at him. Plainly a "continuing violation" theory cannot be used to enable a plaintiff to challenge under Title VII acts by the government that occurred before 1972 merely because he also challenges acts that occurred after 1972. See *Milton* v. *Weinberger*, *supra*, 645 F.2d at 1074-1075.

Petitioner asserts that the four instances of alleged discrimination he identifies become a single, continuous violation because of their "programmatic aspect" (Pet. 15, 17); by this petitioner apparently means that each of these actions was taken by a manager working under a particular Army program. But this allegation can be made whenever a claimant with more than one complaint worked in the same governmental unit at the time of each of the alleged violations, and "[m]ere continuity of employment, without more, is insufficient to prolong the life of a cause of action for employment discrimination" (*Delaware State College* v. *Ricks*, 449 U.S. 250, 257 (1980)). Petitioner also asserts that each of the decisions was based on a "secret file" compiled for discriminatory reasons and containing unfavorable information about petitioner (Pet. 15, 16). But at most, this constitutes only an allegation of another discriminatory act — the creation of the file — the adverse consequences of which did not occur until some later time. As far as petitioner's first three claims are concerned, both the

creation of the file and its consequences occurred before Title VII became applicable to the federal government.[1]

Petitioner's argument that he has alleged a continuing violation relies on only one case that was not decided by the District of Columbia Circuit. That case, *Chisholm* v. *United States Postal Service*, 665 F.2d 482 (4th Cir. 1981), was a class action alleging discrimination of a thoroughly systematic sort — "in the areas of promotion, details, examinations, discipline, and pay" (*id.* at 487). Such a case, in which discrete discriminatory acts may even be impossible to identify, is plainly far removed from petitioner's complaint. In any event, the remark in *Chisholm* on which petitioner relies (*id.* at 490 n.11) was casual dictum. See also *Lawson* v. *Burlington Industries, Inc.*, 683 F.2d 862 (4th Cir. 1982), cert. denied, No. 82-325 (Oct. 18, 1982); *Griffin* v. *Pacific Maritime Association*, 478 F.2d 1118, 1120 (9th Cir.), cert. denied, 414 U.S. 859 (1973).[2]

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[1] We do not intend to suggest that we agree with the court of appeals that petitioner's fourth claim — which pertained to an act that occurred after 1972 but was apparently, in petitioner's view, based solely on the "secret file" — should have escaped summary judgment. See *Chardon* v. *Fernandez*, 454 U.S. 6 (1981); *Delaware State College* v. *Ricks*, *supra*.

[2] In *Bethel* v. *Jefferson*, 589 F.2d 631 (D.C. Cir. 1978), the court found a continuing violation to exist because the "claim * * * encompasse[d] not an assortment of unrelated happenings but a chain of connected events * * * in which pre-1972 episodes were * * * [the] seminal links [but i]n no instance * * * [was the] discrimination * * * consummated until" after 1972. As far as petitioner's first three claims are concerned, the alleged discrimination was fully consummated before 1972. In *Shehadeh* v. *Chesapeake & Potomac Telephone Co.*, 595 F.2d 711 (D.C. Cir. 1978), the plaintiff alleged that "certain critically-situated personnel" employed by the defendant engaged in "a practice * * * of maliciously and discriminatorily forestalling her employment with others" by disseminating false references, numbering perhaps 200. See *id.* at 719, 723, 725. Petitioner, by contrast, alleges no more than four discrete discriminatory acts, undertaken over a period

c. Petitioner also asserts (Pet. 17-23) that the district court erred in denying his post-judgment motion for reconsideration. This motion was based on the district court's decision in *Clark* v. *Alexander*, 489 F. Supp. 1236 (D.D.C. 1980), aff'd in part and rev'd in part, 665 F.2d 1168 (D.C. Cir. 1981), which held that one of petitioner's co-workers in the Army's Office of Employment Policy and Grievance Review had been discriminated against because of her sex and because she was involved in the enforcement of the equal employment opportunity program. *Clark* was decided more than one year before the district court entered summary judgment against petitioner; petitioner does not explain his failure to invoke the decision for so long. We are informed that the evidence in *Clark* was developed over a six-year period; during four of those years, petitioner was employed in the same office as the plaintiff in *Clark*.

Moreover, as the district court (Pet. App. 23a-24a n.*) and the court of appeals (*id.* at 21a-22a) noted, petitioner has failed to explain why the *Clark* decision entitled him to reconsideration, or why it is relevant to his claim at all. Unlike petitioner, the plaintiff in *Clark* was a woman, and in any event petitioner does not assert that he was discriminated against because of his sex. It is unclear whether petitioner believes he was discriminated against because of his equal employment opportunity activities (compare Pet. 18-19 with Pet. 20), but petitioner suggests no reason to believe that he was excusably unaware of such discrimination until *Clark* was decided. Petitioner asserts that until *Clark* was decided, "he was * * * unaware of the fact that a federal court had found that * * * the discrimination he had

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of four years by different people. Indeed, to the extent petitioner urges that each of the four acts was the outgrowth of the alleged secret file, he has arguably claimed only a single discriminatory act — the compiling of that file. See note 1, *supra*.

suffered as a Jew * * * was being perpetuated" (Pet. 20). But the court in *Clark* — which was not a class action and involved no claim of religious discrimination — made no such finding; any analogous finding about the *Clark* plaintiff had, at most, limited precedential effect that was irrelevant to the issue on which summary judgment was granted and which the district court and the court of appeals were free to disregard; and petitioner does not explain why (or even assert that) he was excusably unaware of the alleged perpetuation of discrimination against him.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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